ORIGINAL

No. 98-7809

ORIGINAL
Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

SALVADOR MARTINEZ,

Petitioner,

v.

COURT OF APPEAL OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Does a criminal defendant have a federal constitutional right to elect self-representation in the direct appeal from the judgment of his conviction?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998
No. 98-7809

SALVADOR MARTINEZ,

Petitioner,

v.

COURT OF APPEAL OF CALIFORNIA,

Respondent.

STATEMENT OF THE CASE

Petitioner, who proceeded in pro se of his trial, was convicted by a jury of the fraudulent appropriation of the property of another in violation of California Penal Code section 503. The jury also found true that Petitioner had suffered three prior strike convictions within the meaning of California Penal Code sections 667(d), 667(e)(2), 1170.12(b), and 1170.12(c)(2). As a result, Petitioner's sentence for his new crime was twenty-five years to life in state prison.

On September 3, 1998, Petitioner filed a notice of appeal. On October 16, 1998, Petitioner's request to proceed in pro se was denied by the California Court of Appeal, Fourth Appellate District, Division Three. In doing so, the court cited to In re Walker, 56 Cal. App. 3d 225, 128 Cal. Rptr. 291 (1976).

On October 27, 1998, Petitioner filed a petition for writ of mandate with the California Supreme Court in case number S074340. On November 18, 1998, the petition was denied.

Petitioner filed his Petition for a Writ of Certiorari on December 29, 1998. On January 14, 1999, the California Court of Appeal, Fourth Appellate District, Division Three, granted Petitioner's request for a stay of his appeal pending the ruling by this Court on the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW IS CORRECT AND CALIFORNIA'S APPELLATE REVIEW PROCESS COMPLIES WITH THE DUE PROCESS AND EQUAL PROTECTION CLAUSES

California courts have consistently and properly ruled that a criminal appellant has no federal constitutional right to elect self-representation on appeal.[1] Scott, 64 Cal. App. 4th at 554; In re Walker, 56 Cal. App. 3d 225, 128 Cal. Rptr. 291 (1976).

The writ should be denied because the decision below was correct; California's appellate process comports with due process and equal protection, and the Constitution does not recognize a right to elect self-representation on appeal.

A. There Is No Constitutional Right To Elect Self-Representation On Appeal

There is nothing in the text of the Constitution which guarantees to a criminal defendant the right to elect self-representation on appeal.

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1. The California Supreme Court in People v. Massie, 19 Cal. 4th 550, 570, 967 P.2d 29, 42, 79 Cal. Rptr. 2d 816 (1998), citing to the decision in People v. Scott, 64 Cal. App. 4th 550, 554, 75 Cal. Rptr. 2d 315, 318 (1998), agreed that this Court's decision in Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), did not grant a constitutional right to elect self-representation on appeal.

1. The standards governing recognition of a fundamental right under the United States Constitution

This Court looks to the text of the Constitution, not the purported "importance" of the asserted right, when deciding whether an asserted right is "fundamental." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-35, 93 S. Ct. 1278, 1297-98, 36 L. Ed. 2d 16 (1973); see also, Vacco v. Quill, 521 U.S. 793, 799-800, 117 S. Ct. 2293, 2297, 138 L. Ed. 2d 834 (1997). "The Due Process Clause does not demand uniformity of procedure, each State is free to devise its own way of securing essential justice in these situations." Hysler v. State of Florida, 315 U.S. 411, 416-17, 62 S. Ct. 688, 691, 86 L. Ed. 932 (1942). Thus, states are "free to devise their own systems of review in criminal cases," the "[p]rocedural details for securing fairness" are left to the states, and the manner in which a state chooses to adjudicate claims is afforded wide discretion, "so long as they observe those ultimate dignities of man which the United States Constitution assures." Carter v. People of State of Illinois, 329 U.S. 173, 176, 67 S. Ct. 216, 219, 91 L. Ed. 172 (1946).

In determining whether a right is "fundamental," the Court has admonished courts not to take an "expansive view" of the "authority to discover new fundamental rights imbedded in the Due Process Clause," and has further admonished that there should be "great resistance to expand the substantive reach of

those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental." Bowers v. Hardwick, 478 U.S. 186, 194-95, 106 S. Ct. 2841, 2846, 92 L. Ed. 2d 140 (1986).

2. There is no constitutional right to an appeal

Over a century ago, this Court held that the Constitution does not require states to grant appeals as of right to criminal defendants seeking to review alleged trial court errors, and that the right of review in an appellate court is purely a matter of State concern. Kohl v. Lehlback, 160 U.S. 293, 299, 16 S. Ct. 304, 40 L. Ed. 432 (1895); McKane v. Durston, 153 U.S. 684, 687-88, 14 S. Ct. 913, 915, 38 L. Ed. 867, 868 (1894). "Indeed, for a century after the Court was established, no appeal as of right existed in criminal cases, and, as a result, appellate review of criminal convictions was rarely allowed." Abney v. United States, 431 U.S. 651, 656, 97 S. Ct. 2034, 2038, 52 L. Ed. 2d 651 (1977).

In the over 100 years since the Court's decision in McKane, this Court has never retreated from its holding that a criminal defendant has no constitutional right to an appeal, and that it is wholly within the discretion of the states whether to allow such a review. Johnson v. Fankell, 520 U.S. 911, 922-23, n.13, 117 S. Ct. 1800, 1807, n.13, 138 L. Ed. 2d 108 (1997); M.L.B. v. S.L.J., 519 U.S. 102, 110, 117 S. Ct. 555, 560, 136 L. Ed. 2d 473 (1996); Goeke v. Branch, 514 U.S.

115, 120, 115 S. Ct. 1275, 1278, 131 L. Ed. 2d 152 (1995); Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312, 77 L. Ed. 2d 987 (1983); Abney, 431 U.S. at 656; United States v. MacCollom, 426 U.S. 317, 323, 96 S. Ct. 2086, 2091, 48 L. Ed. 2d 666 (1976); Estelle v. Dorrough, 420 U.S. 534, 536-38, 95 S. Ct. 1173, 1175-76, 43 L. Ed. 2d 377 (1975) [per curiam]; Griffin v. Illinois, 351 U.S. 12, 18, 76 S. Ct. 585, 590, 100 L. Ed. 891 (1956).

3. A criminal defendant has no constitutional right to be present at or argue an appeal

In Price v. Johnston, 334 U.S. 266, 285, 68 S. Ct. 1049, 1060, 92 L. Ed. 1356 (1948), this Court held a criminal defendant has no constitutional right to be present at or argue his appeal, and "sharp[ly] contrast[ed]" this with the constitutional right to be "present in person at each significant stage of a felony prosecution, and to his recognized privilege of conducting his own defense at the trial." Indeed, while this Court in Faretta recognized a criminal defendant's right to represent himself at trial under the Sixth and Fourteenth Amendments to the Constitution, the Court specifically distinguished the federal constitutional nature of defendant's right to conduct his own defense at the trial level from other appellate stages of the judicial process. Faretta, 422 U.S. at 816.

That a criminal defendant has no constitutional right to be present at or argue his appeal significantly contrasts with the constitutional right to be present during all critical stages of trial, Kentucky v. Stincer, 482 U.S. 730, 744, 107 S. Ct. 2658, 2667, 96 L. Ed. 2d 631 (1987); Rushen v. Spain, 464 U.S. 114, 117, 104 S. Ct. 453, 455, 78 L. Ed. 2d 267 (1983); Faretta, 422 U.S. at 820, n.15; Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 332, 78 L. Ed. 674 (1934), and the constitutional right to present his own testimony at trial, Rock v. Arkansas, 483 U.S. 44, 51-53, 107 S. Ct. 2704, 2708-09, 97 L. Ed. 2d 37 (1987); Nix v. Whiteside, 475 U.S. 157, 164, 106 S. Ct. 988, 993, 89 L. Ed. 2d 123 (1986); Brooks v. Tennessee, 406 U.S. 605, 612, 92 S. Ct. 1891, 1895, 32 L. Ed. 2d 358 (1972); Harris v. New York, 401 U.S. 222, 225, 91 S. Ct. 643, 645, 28 L. Ed. 2d 1 (1971); In re Oliver, 333 U.S. 257, 273, 68 S. Ct. 499, 507, 92 L. Ed. 682 (1948).

4. If a state grants appellate review, the due process and equal protection clauses -- not the Sixth Amendment -- grant the right to the effective assistance of appellate counsel

This Court's decisions demonstrate that the rights, remedies, and procedures granted a criminal defendant by a state's appellate review flow from the Fourteenth Amendment Due Process and Equal Protection Clauses, which demand the effective assistance of retained or appointed appellate

counsel. They do not derive from the Sixth Amendment, the foundation of Faretta.

In Griffin, the Court held that a transcript of the trial court proceedings must be provided to an indigent criminal appellant if that was the only way to ensure an "adequate and effective" appeal. Griffin, 351 U.S. at 13-14. In doing so, the Court recognized that while a state had no constitutional obligation to provide appellate review, if the state chose to create such a right, the Due Process and Equal Protection Clauses protected indigent criminals from "invidious discriminations." Id., at 18.

In 1963, this Court in Douglas v. California, 372 U.S. 353, 356-58, 83 S. Ct. 814, 816-17, 9 L. Ed. 2d 811 (1963), held that when a state in its discretion created a right to an appeal, it must provide counsel, basing such a right not on the Sixth Amendment, but on the Fourteenth Amendment, which required the state to make the appeal more than a "meaningless ritual" by supplying an indigent appellant with counsel. Id., at 358.

On the same day, this Court held that the right of an indigent defendant to counsel at trial flowed from the explicit grant of that specific right in the Sixth Amendment, made applicable to the states through the Due Process Clause of the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335, 339, 83 S. Ct. 792, 794, 9 L. Ed. 2d 799 (1963).

In Rinaldi v. Yeager, 384 U.S. 305, 310, 86 S. Ct. 1497, 1500, 16 L. Ed. 2d 577 (1966), this Court summarized the Griffin line of decisions and held, without reference to the Sixth Amendment, that while the Court had never held that the States are required to establish avenues of appellate review, these avenues once established, "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." Requiring counsel on first appeal does not impede this.

Indeed, subsequently, this Court held the appellate attorney appointed must be available to assist in preparing and submitting a brief to the appellate court, Swenson v. Bosler, 386 U.S. 258, 259, 87 S. Ct. 996, 997, 18 L. Ed. 2d 33 (1967), and must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim, Entsminger v. Iowa, 386 U.S. 748, 750-51, 87 S. Ct. 1402, 1403, 18 L. Ed. 2d 501 (1967); Anders v. California, 386 U.S. 738, 743-45, 87 S. Ct. 1396, 1399-400, 18 L. Ed. 2d 493 (1967).

In Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974), this Court held that the states were left to decide whether to provide counsel to indigent state defendants in their discretionary appeals. In doing so, this Court acknowledged that the rationale for the Griffin and Douglas line of cases had "never been explicitly established" and that "some support" was found in both the Due Process and

Equal Protection Clauses. Ross, 417 U.S. at 608-09. This Court in Ross again recognized the critical differences between the trial and appellate stages. Id., at 610-11.

In the year following Moffitt, this Court in Faretta recognized a criminal defendant had a corollary fundamental constitutional right, flowing directly from the Sixth Amendment right to counsel at trial, to represent himself at trial without assistance of counsel. Faretta, 422 U.S. at 818-33. The recognition of this right in Faretta was "based on the long-standing recognition of a right of self-representation in federal and most state courts, and on the language, structure, and spirit of the Sixth Amendment." McKaskle v. Wiggins, 465 U.S. 168, 174, 104 S. Ct. 944, 978, 79 L. Ed. 2d 122 (1984).

In Jones, this Court held a criminal defendant had no constitutional right to have appellate counsel raise every nonfrivolous issue the defendant requests, and that it was appellate counsel, and not his client, who decided the issues to be presented, even over his client's objections. Jones, 463 U.S. at 751-54.

In Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985), this Court held a state could not penalize a criminal defendant by dismissing his first appeal as of right when appointed counsel failed to follow mandatory appellate rules, and that the right to appellate counsel meant the right to "effective assistance." Id., at 396.

Finally, in 1997, this Court in Johnson, once again repeated that prior decisions "made it quite clear that it is a matter for each State to decide how to structure its judicial system," and that respect for the fundamental principles of federalism is at its apex when the Court is confronted with a claim "that federal law requires a State to undertake something as fundamental as restructuring the operation of its courts."[2] Johnson, 520 U.S. at 922-23, n.13.

5. **The justification for self-representation at trial cannot be easily applied to a criminal appeal**

The considerations and justifications for self-representation at trial do not lend themselves to a criminal appeal. At trial, unlike an appeal, the state's desire is to transform a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. In order to accomplish this purpose, the prosecuting attorney presents evidence and witnesses, cross-examines, contradicts and

2. In Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987), the Court declined to extend the right to appointed appellate counsel beyond the appointment of counsel to represent the criminal defendant in his first appeal as of right. In Austin v. United States, 513 U.S. 5, 6-8, 115 S. Ct. 380, 130 L. Ed. 2d 219 (1994), this Court held that the constitutional right of indigent defendants pursuing appeals as of right to a brief filed on their behalf by an attorney did not extend to forums for discretionary review, and an attorney may be relieved of the duty to file frivolous petitions.

challenges defense witnesses, challenges and argues rulings of the court, and directs arguments to both the court and jury in order to convince them of the defendant's guilt.

In contrast, it is generally the criminal defendant, rather than the state, who initiates the appellate process, seeking to overturn the court or jury's guilty verdict, rather than fending off the efforts of the state's prosecutor. The criminal defendant under these circumstances needs an appellate attorney not, as he does at trial, to shield him from being "hauled into court" by the state and stripped of his presumption of innocence, but instead as a "sword" to upset the prior determination of guilt. Ross, 417 U.S. at 611.

> This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all.

Id.

6. **A state's refusal to permit self-representation on appeal does not deny a criminal appellant due process or equal protection, and is reviewed under the rational basis standard**

This Court's decisions recognize that a criminal appellant's right to due process is protected only if he is represented by counsel in his appeal. However, these due process concerns are undermined, and not furthered, by

permitting the criminal appellant to elect self-representation.

In this regard, in both Faretta and Gideon, the right to counsel and self-representation at trial were based upon an historical and textual analysis of the Sixth Amendment, which commands, protects, and guarantees the right to counsel and self-representation at trial.

However, as stated above, a criminal defendant's right to the effective assistance of appointed or retained counsel on appeal, announced by this Court in Douglas, Anders, Swenson, Rinaldi, Moffitt, and Evitts, flows not from the Sixth Amendment but instead from the broader and flexible protections of the Fourteenth Amendment guarantees of due process and equal protection. Blandino v. State, 112 Nev. 352, 914 P.2d 624, 626 (Nev. 1996), cert. denied, 519 U.S. 881, 117 S. Ct. 208, 136 L. Ed. 2d 143 (1996).

This distinction is significant, for the Due Process and Equal Protection Clauses, unlike the strict commands of the Sixth Amendment, generally focus on the reliability or fairness of the process. Gilbert v. Homar, 520 U.S. 924, 930, 117 S. Ct. 1807, 1812, 138 L. Ed. 2d 120 (1997); Cafeteria Workers v. McElroy, 367 U.S. 886, 894-95, 81 S. Ct. 1743, 1748, 6 L. Ed. 2d 1230 (1961). In this regard, "due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972); see

also, Gilbert, 520 U.S. at 930; Zinermon v. Burch, 494 U.S. 113, 127, 110 S. Ct. 975, 984, 108 L. Ed. 2d 100 (1990); Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 320, 105 S. Ct. 3180, 87 L. Ed. 2d 220 (1985); Superintendent, Massachusetts Correctional Institution, Walpole v. Hill, 472 U.S. 445, 454, 105 S. Ct. 2768, 2773, 86 L. Ed. 2d 356 (1985).

Thus, the due process guarantee, unlike the Sixth Amendment's guarantee of the right to counsel and self-representation at trial, is meant to "minimize the risk of erroneous decisions," and "the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error." Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 13, 99 S. Ct. 2100, 2106, 60 L. Ed. 2d 668 (1979). The flexibility of due process is "a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." Morrissey, 408 U.S. at 481.

To determine what procedural protections the Constitution requires in a particular case, the Court weighs several factors: (1) the interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens

that the additional or substitute procedural requirement would entail. Zinermon, 494 U.S. at 127.

In defining the process necessary to ensure "fundamental fairness" the Court has recognized that the Due Process Clause does not require that the procedures used are "'so comprehensive as to preclude any possibility of error,'" and that "the marginal gains from affording an additional procedural safeguard often may be outweighed by the societal cost of providing such a safeguard." Walters, 473 U.S. at 320.

The Due Process Clause protects only those "fundamental rights and liberties" which are "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2258, 2268, 138 L. Ed. 2d 772 (1997), citing Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977); Palko v. Connecticut, 302 U.S. 319, 325, 58 S. Ct. 149, 82 L. Ed. 288 (1937); and Snyder, 291 U.S. at 105; see also, Bowers, 478 U.S. at 193-94.

More recently, this Court has held an action violates due process if it "shocks the conscience" and was so "brutal" that it violates the "decencies of civilized conduct." County of Sacramento v. Lewis, 523 U.S. 833, 1717, 118 S. Ct. 1708, 1716-17, 140 L. Ed. 2d 1043 (1998).

In dealing with challenges to a state's regulation of the right of appeal in criminal cases, the Court applies the traditional rational-basis test. Estelle, 420 U.S. at 538; Rinaldi, 384 U.S. at 309. Under the rational basis test:

> If a legislative classification or distinction "neither burdens a fundamental right nor targets a suspect class, [the Court] will uphold [it] so long as it bears a rational relation to some legitimate end."

Vacco, 521 U.S. at 799, citing Romer v. Evans, 517 U.S. 620, 631, 116 S. Ct. 1620, 1627, 134 L. Ed. 2d 855 (1996).

> [A] classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," [the] statute is presumed constitutional, [and] "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," whether or not the basis has a foundation in the record.

Heller v. Doe, 509 U.S. 312, 320, 113 S. Ct. 2637, 2642-43, 125 L. Ed. 2d 257 (1993).

"Generally speaking, laws that apply evenhandedly to all 'unquestionably comply' with the Equal Protection Clause." Vacco, 521 U.S. at 800; New York City Transit Authority v. Beazer, 440 U.S. 568, 587-88, 99 S. Ct. 1355, 1366-67, 59 L. Ed. 2d 587 (1979). A classification not involving fundamental rights nor proceeding along suspect lines is accorded a "strong presumption of validity." Heller, 509 U.S. at 319.

Here, as stated above, it is well-settled there is neither a constitutional right to an appeal nor to be present at or argue an appeal, and that a state is entitled to wide

discretion in determining its own criminal procedures. Against this background, it is, in language the Court used in addressing a different claimed due process right, "at best, facetious" to claim the right to self-representation on appeal is "'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty,'" or that to deny self-representation on appeal "shocks the conscience" or is so brutal as to violate "decencies of civilized conduct." Bowers, 478 U.S. at 194; Lewis, 523 U.S. at 1717.

In sum, there is simply no good reason to alter years of fundamental understanding about the relationship of the state and federal judicial processes by imposing upon the states a constitutional requirement that they afford a criminal appellant the right to elect self-representation.

B. California's Appellate Process Comports With The Requirements Of The Due Process And Equal Protection Clauses And Bears A Rational Relation To A Legitimate End

1. California's appellate process ensures the right to a thorough appeal brought by competent appellate counsel

The right to appeal a civil or criminal case in California is statutory. Cal. Code Civ. Proc. § 904.1; Cal. Penal Code §§ 1235, 1237, 1466; Scott, 64 Cal. App. 4th at 555 n.6; 9 Witkin, Cal. Procedure (4th ed. 1997), Appeal, § 2, p. 33. California has created various statutory and constitutional provisions to ensure an appellant is

represented by competent counsel and is afforded due process. People v. Grey, 225 Cal. App. 3d 1336, 1339, 275 Cal. Rptr. 572 (1990).

Rule 470 of the California Rules of Court requires trial courts at the time of judgment and sentencing to advise defendants convicted at trial of their appellate rights, including the right to counsel, and the steps that must be taken to protect those rights. Rule 31 of the California Rules of Court provides a defendant sixty days in which to file his notice of appeal. The defendant's trial counsel is required to file for the indigent defendant the notice of appeal or any statement showing reasonable constitutional, jurisdictional or other grounds going to the legality of the proceedings pursuant to California Penal Code sections 1237.5 and 1240.1(b). Scott, 64 Cal. App. 4th at 563-64.

The appointment of counsel for indigent appellants in criminal cases is administered by an independent agency in the Fourth Appellate District, Appellate Defenders Inc. ("ADI"), which performs administrative functions in connection with the appointment of appellate counsel. In re Angelica V., 39 Cal. App. 4th 1007, 1014, 46 Cal. Rptr. 2d 295 (1995). Pursuant to rule 76.5(d) of the California Rules of Court, the state appellate courts are relieved of the duty of assuring the quality of appointed counsel under the guidelines in section 20 of the Standards of Judicial Administration, because the qualified attorneys in ADI are required to "consult with and

assist appointed counsel concerning the issues on appeal and appellant's opening brief." Angelica V., 39 Cal. App. 4th at 1014.

A criminal appellant in California, like a criminal appellant in a federal court, has neither a constitutional nor statutory right to argue his case on appeal or to be present during such proceeding. Cal. Penal Code § 1255; People v. Ashley, 59 Cal. 2d 339, 361, 379 P.2d 496, 29 Cal. Rptr. 16 (1963), cert. denied, 374 U.S. 819, 83 S. Ct. 1714, 10 L. Ed. 2d 1084 (1963); Walker, 56 Cal. App. 3d at 228.

In California, to meet the obligations of a competent advocate, appellate counsel has a duty to prepare a legal brief containing citations to the appellate record and appropriate authority, discuss all material facts, set forth all arguable issues, provide an adequate appellate record and advocate changes in the law if argument can be made supporting change. People v. Barton, 21 Cal. 3d 513, 519, 579 P.2d 1043, 146 Cal. Rptr. 727 (1978); Scott, 64 Cal. App. 4th at 564; People v. Acosta, 48 Cal. App. 4th 411, 426, 55 Cal. Rptr. 2d 675, 683-84 (1996); People v. Harris, 19 Cal. App. 4th 709, 714, 23 Cal. Rptr. 2d 586 (1993).

A criminal appellant in California may nonetheless file in pro se a state petition for a writ of habeas corpus raising any and all claims he believes appellate counsel should have raised, arguing "inexcusable failure of appellate counsel to raise crucial assignments of error [occurred], which arguably

might have resulted in reversal." People v. Mitchell, 68 Cal. App. 4th 1489, 1497, 81 Cal. Rptr. 2d 339, 344 (1999); see also, In re Jones, 27 Cal. App. 4th 1032, 1040-41, 33 Cal. Rptr. 2d 469 (1994); In re Spears, 157 Cal. App. 3d 1203, 1210-14, 204 Cal. Rptr. 333, 337-40 (1984).

A criminal appellant who believes his appellate counsel was ineffective may file a state habeas petition as soon as he or she learns or should have learned of the information offered in support of the claim. See, In re Robbins, 18 Cal. 4th 770, 815 n.35, 959 P.2d 311, 341 n.35, 77 Cal. Rptr. 2d 153 (1998); In re Gallego, 18 Cal. 4th 825, 839 n.15, 959 P.2d 290, 300 n.15, 77 Cal. Rptr. 2d 132 (1998). Appellate counsel's ineffectiveness in failing to raise a claim may be "rectified" by raising the claim in a state petition for a writ of habeas corpus. People v. Denison, 68 Cal. App. 4th 1283A, 79 Cal. Rptr. 2d 524, 534 (1998).

2. Denial of self-representation on appeal comports with due process and equal protection

California's appellate process comports with the requirements of due process and equal protection and bears a rational relation to a legitimate end. First, as stated above, the Court has admonished that the procedures and manner in which a state chooses to adjudicate claims is afforded wide discretion. Carter, 329 U.S. at 176.

Second, California's denial of self-representation on appeal applies evenly to all criminal defendants, and thus the denial unquestionably complies with the Equal Protection Clause. Vacco, 521 U.S. at 793; Beazer, 440 U.S. at 587-88.

Third, the creation of a constitutional right to elect self-representation on appeal raises a series of problematic subsidiary questions, including whether and when the criminal appellant must be given notice of this right, how the right is measured, when must he decide, can he change his mind, and whether the court must treat the self-represented criminal appellant differently and relax or enact different rules. While these concerns were at issue in regards to the recognition of the right to self-representation at trial, Faretta, 422 U.S. at 852 [Blackmun, J. dissenting], as set forth above, the right to appeal, unlike the right at trial, is not a fundamental constitutional right, and is instead governed by the more flexible protections of due process and equal protection. Thus, these are appropriate matters for a state to consider in the decision to grant or deny to the defendant the right to self-representation on appeal.

Moreover, as stated above, it is well-settled, and Petitioner does not dispute, that he has no right to be present at or argue his appeal. Pet. at 22; see, Price, 334 U.S. at 285. In addition to having no right to be present at or ague his appeal, if the state offered appellate counsel, and the criminal appellant nonetheless chose to represent

himself, the state would not be required to provide access to a law library or legal materials. Lewis v. Casey, 518 U.S. 343, 351-52, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996); Bounds v. Smith, 430 U.S. 817, 828, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977); see also, Murray v. Giarratano, 492 U.S. 1, 13, 109 S. Ct. 2765, 2772, 106 L. Ed. 2d 1 (1989) [O'Conner, J., concurring] ["[b]eyond the requirements of Bounds, the matter is one of legislative choice based on difficult policy considerations and the allocation of scarce legal resources."].[3]

A self-represented criminal appellant will, without a law library or legal materials, nonetheless be required to comply with "the relevant rules of procedural and substantive law." Faretta, 422 U.S. at 834, n.46; McKaskle, 465 U.S. at 173.[4]

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3. See also, United States v. Kincaide, 145 F.3d 771, 778 (6th Cir. 1998); Lamp v. State of Iowa, 122 F.3d 1100, 1105 (8th Cir. 1997); Degrate v. Godwin, 84 F.3d 768, 769 (5th Cir. 1996); Glover v. Johnson, 75 F.3d 264, 267 (6th Cir.), cert. denied, 519 U.S. 816, 117 S. Ct. 67, 136 L. Ed. 2d 28 (1996); Brooks v. Buscher, 62 F.3d 176, 179-80 (7th Cir. 1995); Schrier v. Halford, 60 F.3d 1309, 1313 (8th Cir. 1995); Carper v. DeLand, 54 F.3d 613, 616 (10th Cir. 1995); Knop v. Johnson, 977 F.2d 996, 999 (6th Cir. 1992), cert. denied, 507 U.S. 973, 113 S. Ct. 1415, 122 L. Ed. 2d 786 (1993); United States v. Sammons, 918 F.2d 592, 602 (6th Cir. 1990); U.S. v. Smith, 907 F.2d 42, 45 (6th Cir. 1990), cert. denied, 498 U.S. 986, 111 S. Ct. 521, 112 L. Ed. 2d 533 (1990); United States ex rel. George v. Lane, 718 F.2d 226, 231 (7th Cir. 1983); United States v. Wilson, 690 F.2d 1267, 1271 (9th Cir. 1982), cert. denied, 464 U.S. 867, 104 S. Ct. 205, 78 L. Ed. 2d 178 (1983); United States v. Chatman, 584 F.2d 1358, 1359-60 (4th Cir. 1978); Brinson v. McKeeman, 992 F. Supp. 897, 910 (W.D. Tex. 1997).

4. See, Ogden v. San Juan County, 32 F.3d 452, 455 (10th

Finally, a criminal defendant who chooses to represent himself will waive any claim of ineffective assistance of appellate counsel. Faretta, 422 U.S. at 835, n.46; McNeil v. United States, 508 U.S. 106, 113, 113 S. Ct. 1980, 124 L. Ed. 2d 21 (1993); McKaskle, 465 U.S. at 177, n.8.

One result of recognizing a right to self-representation on appeal will be that when the respondent and the state court review the pleadings prepared by self-represented criminal appellants, both will be forced to decipher such materials and in doing so, "out of conscience," the state court will further be forced to wear two hats -- that of a state appellate judge and that of advocate. The Court has held these pleadings are liberally construed, Haines v. Kerner, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972), and adherence to such a policy would complicate a state's ability to function as an effective adversary during appellate proceedings, since the state would be expected to

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Cir. 1994), cert. denied, 513 U.S. 1090, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); Wells v. Brown, 891 F.2d 591, 594 (6th Cir. 1989) [collecting cases where courts have required pro se litigants to adhere to basic pleading requirements]; United States v. Flewitt, 874 F.2d 669, 671-676 (9th Cir. 1989); United States v. Merrill, 746 F.2d 458, 465 (9th Cir. 1984), cert. denied, 469 U.S. 1165, 105 S. Ct. 926, 83 L. Ed. 2d 938 (1985).

Thus, for example, in Texas, the failure of a pro se appellant to comply with state rules regarding the content and form of the brief results in the summary denial of such claims. See, e.g., Kindley v. State, 879 S.W.2d 261, 263 (Tex. App. 1994); Sonnier v. State, 913 S.W.2d 511, 520 (Tex. Crim. App. 1995); Pierce v. State, 777 S.W.2d 399, 418 (Tex. Crim. App. 1989), cert. denied, 496 U.S. 912, 110 S. Ct. 2603, 110 L. Ed. 2d 283 (1990).

charitably evaluate the contentions raised by a criminal appellant acting in propria persona. In this regard, the Court may recognize and judicially notice the generally inferior quality of pro se briefs and "the superior ability of trained counsel in the 'examination into the record, research of the law, and marshaling of arguments on [the appellant's] behalf.'" Jones, 463 U.S. at 751, citing Douglas, 372 U.S. at 358. Thus, an obligation to liberally construe pro per pleadings would impair the appellate process for both the respondent state and the reviewing appellate court.

Another result of recognizing such a right is that it renders it more likely the defendant will lose his appeal. See, Faretta, 422 U.S. at 834, 838, 852.[5]

Under these circumstances, granting a criminal appellant a right to self-representation on appeal would be a Pyrrhic victory. The self-represented appellant would have no right to legal materials or counsel in order to file a brief, and, once the brief was somehow drafted and filed without counsel or adequate legal materials, the appellant would have no right to be present at or argue the appeal, and would lose any claim of ineffective assistance. Such a "Pyrrhic

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5. See also, United States v. Baker, 84 F.3d 1263, 1264 (10th Cir. 1996), quoting McKaskle, 465 U.S. at 177, n.8; Fields v. Murray, 49 F.3d 1024, 1031 (4th Cir.), cert. denied, 516 U.S. 884, 116 S. Ct. 224, 133 L. Ed. 2d 154 (1995) ("[A] determination in the defendant's favor here means that he represents himself which, if anything, is more likely to produce a conviction[.]").

victory," as held by one federal court addressing a different issue, would be "cold gruel," and would "do little to burnish the public's perception of the judicial system." CMM Cable Rep., Inc. v. Ocean Coast Properties, Inc., 48 F.3d 618, 621 (1st Cir. 1995).

Moreover, even if it were good policy for California to permit criminal defendants to represent themselves in their direct appeal, such an idea is not mandated by the Constitution. As Justice O'Connor, discussing whether a state should permit a criminal defendant access to a library or grant him an attorney, succinctly put in her concurring opinion in Murray, "the matter is one of legislative choice based on difficult policy considerations and the allocation of scarce legal resources." Murray, 492 U.S. at 13. In our constitutional democracy, such legislative choices are best made by legislators who are subject to removal by the people. See, San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 31, 93 S. Ct. 1278, 1295, 36 L. Ed. 2d 16 (1973). A "'mother knows best' approach should play no part in traditional constitutional adjudication." Murray, 492 U.S. at 11 [Plurality opinion of Rehnquist, C.J.].

In sum, this Court has held that unlike a trial, the criminal defendant needs an attorney on appeal "as a sword to upset the prior determination of guilt." Ross, 417 U.S. at 611. Moreover, the Court has held that "[i]t is undeniable that in most criminal prosecutions defendants could better

defend with counsel's guidance than by their own unskilled efforts." Faretta, 422 U.S. at 834, emphasis added. "The appellate lawyer must master the trial record, thoroughly research the law, and exercise judgment in identifying the arguments that may be advanced on appeal." McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429, 438, 108 S. Ct. 1895, 1901, 100 L. Ed. 2d 440 (1988). Direct appeal "is the primary avenue for review of conviction or sentence" as "[w]hen the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence." Barefoot v. Estelle, 463 U.S. 880, 887, 103 S. Ct. 3383, 3391, 77 L. Ed. 2d 1090 (1983).

Under these circumstances, "the services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits." Evitts, 469 U.S. at 387, 393. "Capable lawyering [on direct appeal] would mean fewer colorable claims of ineffective assistance of counsel to be litigated on collateral attack." Murray, 492 U.S. at 11.

Finally, as stated above, California has adequately provided a vehicle for a criminal appellant to bring before the state court those claims not brought by appointed counsel, through a state petition for a writ of habeas corpus. Robbins, 18 Cal. 4th at 815, n.35; Mitchell, 68 Cal. App. 4th at 1496-98.

California has rationally chosen to create an appellate review process by which counsel is appointed on direct appeal, and the criminal appellant is free to file any additional claims in a state petition for a writ of habeas corpus. This appellate process comports with the fundamental protections of due process and equal protection, "promotes the efficient, dignified operation" of the courts, Estelle, 420 U.S. at 537, and "advances an interest in efficient, dignified appellate practice," Ortega-Rodriguez v. United States, 507 U.S. 234, 241, 113 S. Ct. 1199, 1204-05, 122 L. Ed. 2d 581 (1993).

II.

THE STATES AND FEDERAL COURTS ARE DIVIDED AS TO WHETHER A CRIMINAL APPELLANT HAS THE CONSTITUTIONAL RIGHT TO ELECT SELF-REPRESENTATION

The states and federal courts are divided as to whether a criminal appellant has a constitutional right to elect self-representation. Respondent submits that, as outlined above, the most persuasive authorities, including California, Nevada,[6] Tennessee,[7] Maryland,[8] Florida[9] and the Fourth[10] and Seventh Circuits[11] have found no such right in the text of the Constitution. Some other jurisdictions have had contrary views.[12]

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6. Blandino, 914 P.2d at 626.

7. State v. Gillespie, 898 S.W.2d 738, 741 (Tenn. Crim. App. 1994); Weatherly v. State, 704 S.W.2d 730, 731 (Tenn. Crim. App. 1985); State v. Cole, 629 S.W.2d 915, 917 (Tenn. Crim. App. 1981); State v. Reeves, 610 S.W.2d 730, 731 (Tenn. Crim. App. 1980).

8. Callahan v. State of Maryland, 30 Md. App. 628, 354 A.2d 191, 194 (Md. App. 1976).

9. Hill v. State, 656 So. 2d 1271, 1272 (Fla. 1995).

10. United States v. Gillis, 773 F.2d 549, 559-60 (4th Cir. 1985).

11. Lumbert v. Finley, 735 F.2d 239, 245-46 (7th Cir. 1984).

12. Texas: Webb v. State, 533 S.W.2d 780, 783 (Tex. Crim. App. 1976); Hathorn v. State, 848 S.W.2d 101, 123 (Tex. Crim. App. 1992); New Mexico: State v. Lewis, 104 N.M. 218, 719 P.2d 445, 447-48 (N.M. App. 1986); Michigan: People v. Stephens, 71 Mich. App. 33, 246 N.W.2d 429, 432 (Mich. App. 1976); Arkansas: Gidron v. State, 312 Ark. 517, 850 S.W.2d 331, 332-33 (Ark. 1993); State v. Van Pelt, 305 Ark. 125, 810 S.W.2d 27 (Ark. 1991); Pennsylvania: Com. v. Rogers, 537 Pa. 581, 645 A.2d 223, 224 (Pa. 1994); Louisiana: State v. Warner, 594 So. 2d 397, 402 (La. App. 1991); Indiana: Webb v. State, 274 Ind. 540, 412 N.E.2d 790, 792 (Ind. 1980); Campbell v. Blodgett, 940 F.2d 549 (9th Cir. 1991) (but see, Hines v.

CONCLUSION

Petitioner presents no issue worthy of discretionary review by this Court. It is well-settled that there is neither a constitutional right to an appeal nor to be present at or argue an appeal, and that a state is entitled to wide discretion in determining its own criminal procedures. There is nothing explicit or implicit in the Constitution or in this Court's Faretta decision which grants to a criminal appellant a constitutional right to elect self-representation, and the denial of the right is reviewed under the rational basis test. In light of the important interests of the criminal appellant, the state, and the courts, there is a rational basis for the

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Enomoto, 658 F.2d 667, 677 (9th Cir. 1981)); Chamberlain v. Ericksen, 744 F.2d 628, 630 (8th Cir. 1984), cert. denied, 470 U.S. 1008, 105 S. Ct. 1368, 84 L. Ed. 2d 387 (1985); United States v. Wagner, 158 F.3d 901, 902 (5th Cir. 1998); Myers v. Johnson, 76 F.3d 1330, 1333-34 (5th Cir. 1996); Myers v. Collins, 8 F.3d 249, 252 (5th Cir. 1993); Gomez v. Collins, 993 F.2d 96, 97 (5th Cir. 1993); United States v. Spence, 992 F. Supp. 1413 (S.D. Ga. 1998); United States ex rel. Williams v. O'Leary, 712 F. Supp. 662, 665 (N.D. Ill. 1989); see also, Horton v. Dugger, 895 F.2d 714, 718 (11th Cir. 1990) (Eleventh Circuit discussed the issue, but did not decide whether there was a constitutional right to self-representation on appeal because "appellant presented no evidence to the district court that he did not desire to be represented by counsel on appeal.").

refusal to permit self-representation on appeal, and this denial comports with the requirements of due process and equal protection. Accordingly, the Petition for a Writ of Certiorari should be denied.

Dated: March 18, 1999.

Respectfully submitted,

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